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IN THE

Supreme Court of the United States

October Term, 1957.

No. 33.

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

On Writ of Certiorari to the District Court of Appeal, Second Appellate District, State of California, Division Three.

BRIEF OF RESPONDENTS DOYLE, JACKSON, AND WHEELER IN REPLY TO BRIEF FOR AMICUS CURIAE.

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Summary of Argument.

Amicus contends that petitioners' amended complaint states a cause of action for violation of Constitutional rights.

Respondents[1] believe the question is not properly before this Court. Also, that no violation of the privilege against

[1]The term "respondents", as used herein, refers to the three respondents, Doyle, Jackson, and Wheeler, unless the context indicates otherwise.

self-incrimination is involved, both because the privilege protects solely against criminal prosecution, and also because no federal governmental action is alleged. Further, the state court has no duty, under the Constitution, to afford a civil remedy to persons whose privilege is violated by the federal government.

The fact that federal statutes make interference with certain Constitutional rights of certain persons under certain circumstances a criminal offense and provide for punishment of witnesses in contempt of Congress does not create a federal question in this case.

ARGUMENT.

Petitioners' Amended Complaint Does Not State a Cause of Action for Violation of Constitutional Rights. Nor Is the Question Properly Before This Court.

A. The Question Is Not Properly Before This Court.

Industry respondents, in their several briefs filed in this Court, have thoroughly demonstrated that the question of whether or not petitioners' amended complaint states a cause of action for violation of federal Constitutional rights is not properly before the Court. We concur in their argument.

To illustrate what *petitioners* thought their amended complaint involved, prior to the decision of the District Court of Appeal, we quote the opening paragraph of their Opening Brief in the District Court of Appeal:

> "The nature of the action herein is a claim by appellants against respondents for concerted and malicious interference with appellants' employment relations and right to work, without justification on the part of respondents; the intentional and malicious in-

ducement by respondents of each other and of third persons not to enter into or continue employment relations with appellants, without privilege to do so; and the publication and circulation by respondents of a list containing the names of appellants as a means of effectuating the aforesaid unlawful concert and inducement. The relief sought is money damages and an injunction" [Supp. R., Op. Br. for Pltf.-App. p. 1].

The small importance which petitioners attached to these three respondents, and their alleged conduct, while this cause was in the state courts, is further illustrated by the fact that although the trial court, in sustaining their demurrer to the amended complaint, gave petitioners 30 days within which to file a second amended complaint against them [R. 55], petitioners never bothered to do so.[2]

B. The Privilege Against Self-Incrimination Protects Only Against Criminal Prosecution, Not Against Loss of Employment.

Amicus claims that steps taken to interfere with petitioners' *employment* because of their assertion of the privilege against self-incrimination violates that portion of the Fifth Amendment.

Ullman v. United States (1956), 350 U. S. 422, not cited by *amicus*, is controlling on the point. In upholding the federal Immunity Act of 1954, this Court there said that the Court had often held that the privilege against self-incrimination protected a witness only against giving testimony which might expose him to criminal prosecution.

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[2]The demurrer of Industry Respondents was sustained *without* leave to amend [R. 55].

In support of its holding the Court quoted from *Hale v. Henkel* (1906), 201 U. S. 43. In that case it was said: "The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not be compelled to testify to facts which may impair his reputation for probity, or even to disgrace him but the line is drawn at testimony that may expose him to prosecution. . . .

"The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge." (Pp. 66-67.)

See, also:

8 *Wigmore on Evidence* (3rd Ed., 1940), p. 327.

None of the cases cited by *amicus* is to the contrary. *Bomar v. Keyes* (2d Cir., 1947), 162 F. 2d 136, and *Robeson v. Favelli* (S. D. N. Y., 1950), 94 Fed. Supp. 62 (A. C. Br. 9) both involved causes of action asserted under particular federal statutes[3] which *amicus* does not —and could not—claim are properly invokable here. *Slochower v. United States* (1956), 350 U. S. 551, concerns the application of the Fourteenth Amendment to the discharge of a state employee.

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[3]The *Bomar* case under then 8 U. S. C. 43, the *Robeson* case under then 8 U. S. C. 41, 43, 47(3) and 48. These statutes are now found in title 42, U. S. C., section 1981 *et seq.*

C. No Conduct by Respondents in Their Official Capacity Is Alleged. (If It Were, No Cause of Action Would Be Asserted Against Them Because of Their Constitutional Immunity.)

Amicus finds federal governmental action in the conduct of respondents, because it is alleged in petitioners' amended complaint that these respondents acted "both in their official capacity with relation to said House Committee on Un-American Activities and individually in non-official capacities" [R. 35].

In our Brief on the merits, we demonstrated:

(1) That under both California and federal law, a demurrer does not admit an allegation as to the particular legal capacity in which acts are alleged to have been performed (which is a mere conclusion), where either the pleading shows on its face that the acts were not performed in that capacity, or a court may take judicial notice of that circumstance; and that this Court might take judicial notice that the acts which respondents are alleged to have committed were not acts which could be performed by them in their official capacities (pp. 8-11). See also Brief of Industry Respondents in reply to Brief of *Amicus Curiae*, pages 5-12.

This general principle has often been applied by this Court (see *Nortz v. United States* (1935), 294 U. S. 317, 324-325; *Pierce Oil Corp. v. City of Hope* (1919), 248 U. S. 498, 500; *Straus v. Foxcorth* (1913), 231 U. S. 162, 168).

(2) That petitioners, both in this Court and in the District Court of Appeal, inferentially conceded that respondents had *not* performed the acts in question in their official capacities (p. 11).

(3) That because of the legislative immunity conferred by Article I, Section 6 of the federal Constitution, no cause of action could be asserted against respondents for acts performed by them in their official capacities (pp. 12-14).

Amicus says that whether or not respondents may be held liable in damages for the acts in question, "there is no question about the right to injunctive relief against them if their acts are illegal," citing *Anti-Fascist Committee v. McGrath* (1951), 341 U. S. 123, 140, and *Parker v. Lester* (9th Cir., 1955), 227 F. 2d 708 (A. C. Br. 11).

Neither of the two cases cited involved legislative officials, to whom alone the special Constitutional immunity provided by Article I, Section 6, applies.

In our Brief on the merits we cited *Nelson v. United States* (D. C. Cir., 1953), 208 F. 2d 505, 513, *cert. den.* 346 U. S. 827, where the court said that "a court can no more enjoin a congressional committee from making an unconstitutional search and seizure than it can enjoin Congress from passing an unconstitutional bill."

D. A State Court Has No Duty to Afford a Civil Remedy to One Whose Federal Privilege Against Self-Incrimination Has Been Violated.

Amicus argues that, assuming that petitioners' rights under the privilege against self-incrimination of the Fifth Amendment were violated, the state court below was compelled to afford petitioners a remedy, under the supremacy clause of the Constitution.

Amicus' argument on this novel contention consists of the following:

> "Under the Supremacy clause of Article VI of the Constitution the State Court was obliged to recognize and redress the violation of petitioners' Constitutional right, since, concededly, the court's 'jurisdiction is adequate for the purpose.' *Miles v. Illinois Central R. Co.*, 315 U. S. 698, 703. See also *Smith v. O'Grady*, 312 U. S. 329, 331; *Davis v. Wechsler*, 263 U. S. 22, 24." (A. C. Br. 14.)

The three cases which *amicus* cites afford no support for its position.

The Court's remarks in the *Miles* case about the supremacy clause related to the Federal Employers' Liability Act, which not only expressly confers concurrent jurisdiction on United States and state courts, but expressly prohibits removal of an action instituted in a state court.

In *Smith v. O'Grady* the court's statement that state courts have the obligation to enforce all rights secured by the Constitution was made in connection with a petition for habeas corpus alleging that petitioner had been convicted by methods violating the Fourteenth Amendment—which of course expressly applies to states.

Davis v. Wechsler held that a state court could not entertain a suit in violation of a federal regulation designating the county or district in which suits might be brought against railroads under federal control.

As Industry Respondents have shown, whether or not such a duty might be imposed upon state courts by statute, in the absence of such a statute such courts have no duty whatever to provide a remedy for one whose federal privilege against self incrimination has been infringed. (Ind. Resp. Br. in Reply to A. C. pp. 13-16.)

E. Federal Statutes Do Not Create a Federal Question in This Case.

Amicus also maintains that, even ignoring the applicability of constitutional immunity to respondents, a federal question is nevertheless presented by the amended complaint.

Amicus refers to 18 U. S. C. 241 (A. C. Br. p. 16).

It has been held many times that this section has no application whatever to civil litigation.

Smith v. Jennings (W. D. Mich., 1957), 148 Fed. Supp. 641, 643.

Agnew v. City of Compton (9th Cir., 1957), 239 F. 2d 226, 230;

Gordon v. Garrson (E. D. Ill., 1948), 77 Fed. Supp. 477, 479.

Also, as industry respondents have pointed out, the statute applies only to citizens of the United States, and the amended complaint in this cause does not allege or reveal whether or not petitioners, or any of them, are citizens (Reply to Ind. Resp. to A. C., p. 16).

It is doubtful if the statute applies to the privilege against self-incrimination. In *United States v. Williams* (1951), 341 U. S. 70 (A. C. Br. 16) it is said: "*substantive powers* of the federal government . . . may clearly be protected from private interference" (p. 78; emphasis added). This language suggests *Powe v. United States* (5th Cir., 1940), 109 F. 2d 147, *cert. den.* 309 U. S. 679 (A. C. Br. 17) where it was held that 18 U. S. C. 241 did not apply to any right contained in the first ten amendments to the Constitution (in that case, specifically, free speech under the First Amendment);

that those amendments did not contain grants of power, but were limitations on the federal government.

Earlier cases in accord include:

United States v. Cruikshank (1876), 92 U. S. 542, 552 (A. C. Br. 16) (right of peaceable assembly not within the statute);

United States v. Crosby (C. C. So. Car., 1871), Fed. Cas. No. 14,893, at p. 704 (right to be free of unreasonable searches and seizures not within the statute).

Amicus also refers to 2 U. S. C. 192, dealing with punishment of witnesses for contempt of Congress, but no question of punishment for contempt is here involved.

If we correctly understand *amicus'* position, it does not argue that the statutes apply here directly, but that the existence of the statutes, considered together with the Constitutional privilege, creates an "area of federal policy"; and that, since petitioners' amended complaint relates to this policy area, it therefore states a federal question.

In our view this is a *non sequitur*.

It can hardly be said that a criminal statute (which has no application to civil litigation, applies only to citizens, and probably does not apply to the privilege against self-incrimination), a statute providing for the punishment of witnesses in contempt of Congress (there was none here), and the presence of several Congressmen as defendants, created a federal question in this case.

Conclusion.

The writ of certiorari should be dismissed for want of jurisdiction. If, however, it is determined that jurisdiction of the merits exists, the judgment of the District Court of Appeal should be affirmed.

Respectfully submitted,

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